In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. [illegible]

WRAY EQUIPMENT CORPORATION,

PETITIONER,

v.

WESTINGHOUSE ELECTRIC CORPORATION AND
ALD NEW YORK INC.,

RESPONDENTS.

BRIEF FOR RESPONDENTS WESTINGHOUSE ELECTRIC CORPORATION AND ALD NEW YORK, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the
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OCTOBER TERM, 1960

No. 885

WRAY EQUIPMENT CORPORATION,
PETITIONER,

v.

WESTINGHOUSE ELECTRIC CORPORATION AND ALD NEW YORK, INC.,
RESPONDENTS.

BRIEF FOR RESPONDENTS WESTINGHOUSE ELECTRIC CORPORATION AND ALD NEW YORK, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported in 286 F.2d [illegible] in Appendix A to the petition. [illegible] file an opinion. The District Court's Findings of [illegible] Conclusions of Law are found in the Consolidated Record Appendix beginning at p. 1623.

Question Presented

Whether the Court of Appeals for the First Circuit acted within the limits of its discretion in remanding this case for a new trial where the Court of Appeals found that the trial judge had improperly admitted certain evidence and that such evidence had influenced the trial judge in arriving at his decision in such manner that its admission was prejudicial error.

Statement of the Case

The respondents do not adopt the petitioner's statement of the case. Accordingly, there is set forth below a concise statement of the facts which are material to a consideration of the question presented.

This is an action begun in the United States District Court for the District of Massachusetts in which petitioner sought treble damages from respondents under the Sherman and Clayton Acts, 15 U.S.C. §1 et seq. Petitioner alleged (R.A. 13)[1] that respondents had conspired and were conspiring to monopolize and unreasonably restrain interstate trade and commerce in the distribution of equipment to so-called half-hour laundries and that by various acts in furtherance of this conspiracy petitioner had been [illegible] business.

The case was tried by the district court sitting without a jury. As the Court of Appeals for the First Circuit (hereinafter referred to simply as the Court of Appeals) stated in its opinion (App. A. 20): "An unnecessarily protracted trial of twenty-eight days was held during which

[1] Respondents have adopted in this brief the abbreviations used by petitioner in referring to the consolidated record appendix (R.A.) and the opinion of the Court of Appeals printed as Appendix A to the petition (App. A.).

a great deal of evidence was received by the court over the objection of the defendants. The district judge announced several times that in order to conduct the trial expeditiously he would receive the evidence but that it was subject to a motion to strike to be made at the conclusion of the trial. Motions to strike were made by the defendants at the close of evidence. In the preface to its findings of fact and conclusions of law the lower court stated: 'Defendant ALD submitted a Motion to Strike, which is denied.'" No disposition was made of respondent Westinghouse's motion to strike (App. A. 20, fn. 1).

The district court entered judgment for petitioner and respondents appealed, specifying numerous errors. The Court of Appeals selected one of the errors specified, namely, the district judge's failure to grant respondents' motions to strike the deposition testimony of the witness Hoyt, and held that the district judge's failure to grant the motions was prejudicial error (App. A. 20). The Court of Appeals found that: "The incorporation of Hoyt's gun figure of speech from his deposition in the court's opinion [R.A. 1628] as well as frequent references to it by the court during the trial indicates that defendants were prejudiced by the admission into evidence of the deposition." (App. A. 23). This is actually the ground on which the Court of Appeals vacated the judgment for petitioner and remanded the case for a new trial, as it is abundantly clear that the Court of Appeals had determined on a new trial long prior to its consideration [illegible] dicial attitude. See particularly the statement by the Court of Appeals at App. A. 23:

> "There is another matter which arose during the trial that warrants comment because it may be met again *in a new trial.*" (Emphasis supplied)

The Court of Appeals also stated at the end of its opinion (App. A. 24) that after reading with care the approximately 2000 pages of the record, it had concluded therefrom that the district judge was prejudiced in favor of petitioner and it therefore directed that the new trial be held before another judge (App. A. 24).

Summary of Argument

There is a short and conclusive answer to this petition for certiorari. It is, that the question alleged by petitioner to be presented was not decided by the Court of Appeals. The Court of Appeals reversed and remanded the case for a new trial, not on the ground asserted in the petition that the trial judge was prejudiced, but on the simple ground that the district judge had erred in improperly admitting certain evidence and that the error was sufficiently prejudicial to warrant a new trial. This action by the Court of Appeals does not conflict with any decision of this Court or of any other court of appeals and, being applicable solely to the facts of this case, has no significance beyond the confines of this litigation. As Mr. Justice Frankfurter stated in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74, this Court does not "sit for the benefit of particular litigants."

Argument

I. Petitioner Has Misconstrued the Court of Appeals' Decision and Opinion.

It is clear from the petition filed in this case that petitioner has misconstrued the decision and opinion of the Court of Appeals.

Petitioner has stated at page 10 of its petition that: "The principal reason for the Court of Appeals' vacating the district court's judgment in favor of petitioner and remanding for a new trial before a different judge was its conclusion that the trial judge was prejudiced." The same proposition is reiterated throughout the petition and, indeed, is the basis of petitioner's statement of the "Question Presented" (Pet. 2, 3).

As a careful reading of the Court of Appeals' opinion (App. A. 18-24) plainly indicates, the proposition so often repeated in the petition is clearly wrong. The Court of Appeals found (a) that the district judge had improperly admitted certain deposition testimony (a finding which petitioner does not seriously challenge) and (b) that once the evidence was admitted it had such an impact upon the trial judge that respondents were prejudiced by its admission (App. A. 20, 23). As the Court of Appeals stated at App. A. 24, the testimony "appears from the record to have made an extreme and unreasonable impression on the trial judge."

The Court of Appeals then went on to "comment" on the trial judge's handling of certain other evidence, because the question "may be met again in a new trial," (App. A. 23), and finally to state that because it had determined from a reading of the entire record in the case that the trial judge was prejudiced in favor of petitioner, the retrial of the case should be before another judge (App. A. 24). However, the decision of the Court of Appeals to remand the case for a new trial was quite obviously grounded on its opening conclusion appearing at App. A. 20:

> "We believe that the district court erred prejudicially by failing to grant defendants' motions to strike certain evidence objected to by the defendants."

II. The Petition Presents No Conflict of Decisions.

In *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502, the Court said that:

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393."

The same standard is, of course, stated in Rule 19 of the Revised Rules of the Supreme Court of the United States (1954 ed.) and was affirmed in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70.

Because petitioner has so patently misconstrued the Court of Appeals' decision and opinion, most of what is said in the petition is inapposite. That is particularly true of the conflict which petitioner has pretended to find between the decision of the Court of Appeals in the present case and the decisions of this Court and of other courts of appeals in the cases cited at pages 11 and 12 of the petition[2]

In each of the cases upon which petitioner relies as demonstrating the existence of a conflict, appellant urged that certain conduct of the trial judge evidenced prejudice and bias against appellant. In each case, the issue was whether appellant's objection to the conduct had been

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[2] *Becker Steel Co. of America* v. *Cummings*, 296 U.S. 74; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238, 239; *Scott* v. *Beams* (C.A. 10, 1941) 122 F.2d 777, 782, 789, cert. den. 315 U.S. 809; *Suburban Transit Corporation* v. *Malone* (C.A. 4, 1946) 156 F.2d 422; *Dowell, Inc.* v. *Jowers* (C.A. 5, 1950) 182 F.2d 576, 579; *Slattery* v. *Marra Bros.*, (C.A. 2, 1951) 186 F.2d 134, 137, cert. den. 341 U.S. 915; *Baker* v. *Mueller*, (C.A. 7, 1955) 222 F.2d 180, 183.

sufficiently timely so that he was entitled to insist, as a matter of right, that the appellate court consider the matter on appeal. Since the cases cited by petitioner were concerned with the issue of the trial court's prejudice and bias, rather than the prejudicial admission of evidence, and since respondents here made timely motions to strike the evidence (R.A. 1598, 1615), nothing which those cases decide conflicts with the decision of the Court of Appeals in the present case.

There is no conflict between the decision here and the cases cited by petitioner even if one ignores both (a) the distinction between prejudicial error and prejudice and bias and (b) the fact that respondents did make timely objections to the error on which the Court of Appeals based its decision. None of the cases cited by petitioner suggests that the court of appeals concerned would have committed reviewable error if it had chosen to consider the issue of the trial court's prejudice and bias when first raised on appeal, or even *sua sponte*, and had decided in appellant's favor. On the contrary, in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, the Court, quoting from its opinion in *United States* v. *Atkinson*, 297 U.S. 157, 160, stated that:

> "Of course appellate courts 'in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' "

Petitioner concedes this in the petition (Pet. 11).

III. The Decision of the Court of Appeals Was Based Upon a Finding of Fact.

In the present case, the Court of Appeals found that the erroneous admission of the Hoyt deposition testimony, which was actually quoted in the trial judge's decision (R. 1628), had in fact seriously affected the fairness of the trial in the district court (App. A. 23, 24). That finding was warranted because the district judge was the sole trier of fact, and by examining the entire record, the Court of Appeals was able to determine that the improperly admitted Hoyt deposition had "made an extreme and unreasonable impression on the trial judge" (App. A. 24). It is the Court of Appeals' finding that the evidence in question did in fact prejudicially influence the trier of fact which further distinguishes this case from the *Malone*, *Dowell*, *Slattery* and *Baker* cases (Pet. 11, 12), and from the cases cited at page 15 of the petition.[3] In each of those cases, the trier of fact was a jury and the effect thereon of a particular error could only be presumed.

Since the Court of Appeals' finding that the error was prejudicial was essentially a finding of fact, it is not a proper subject for review by this Court, which has said repeatedly that it should not interfere with the decision of a court of appeals where the latter's conclusions "depend upon appreciation of circumstances which admit of different interpretations" or, stated more simply, where "Proper decision of the controversy depends upon a question of fact." *Federal Trade Commission* v. *American Tobacco Co.*, 274 U.S. 543, 544; *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 400.

Obviously, such a finding is limited to the particular

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[3] *Texas Pacific Ry. Co.* v. *Watson*, 190 U.S. 287, 291; *Chicago, M. & St. Paul Ry. Co.* v. *Harrelson* (C.A. 8, 1926) 14 F.2d 895; *Ralston Purina Co.* v. *Novak*, (C.A. 8, 1940) 111 F.2d 631.

facts of the particular case. It produces no conflict of decisions and it involves no principle the settlement of which is important to the public as distinguished from the immediate parties. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74. Accordingly, a decision based upon such a finding, as was the decision of the Court of Appeals in the present case, should not be reviewed by this Court on a writ of certiorari.

IV. The Decision Below Was an Interlocutory One.

The petition seeks a review by this Court of a decision of the Court of Appeals remanding the case for a new trial (App. A. 24). Such an interlocutory decision is not a proper subject for a grant of certiorari in the absence of a showing that issuance of a writ "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry.*, 148 U.S. 372, 384. There has been no such showing in the present case.

In fact, the decision of the Court of Appeals does not negate the possibility of other instances of reversible error, which could have been adverted to if deemed appropriate. See particularly the Court's opinion at App. A. 20, as follows:

> "Defendants in their appeals specify numerous errors, but we do not believe it is necessary to discuss all of them in the disposition which we make of this case."

It is also significant that the Court of Appeals took care to "express no opinion on the merits of this case", a further indication that the Court had determined as a fact

that the proceedings below had been sufficiently vitiated by error to require a new start.

V. The Petition Seeks Review of a Dictum.

After stating the Court of Appeals' holding that the respondents had been prejudiced by the admission of certain evidence, Judge Hartigan added by way of dictum a "comment" with respect to "another matter which arose during the trial . . . because it may be met again in a new trial." (App. A. 23). The matter upon which Judge Hartigan commented was the district judge's failure to comply with the requirements of Rule 26(d)(4) of the Federal Rules of Civil Procedure, regarding the use of deposition testimony (App. A. 23, 24).

Petitioner has assumed that Judge Hartigan's comment was one of the grounds for the Court of Appeals' decision (Pet. 8, 15). Clearly, the comment was intended as nothing more than an instructive dictum and as such, it is not a proper subject for review by this Court on a petition for certiorari.

VI. Respondents Took Timely Action to Preserve Their Rights.

While the propriety of granting certiorari in the present case does not depend upon the diligence of respondents in protesting the errors of the trial judge, it should be noted that petitioner's charge that respondents were dilatory in raising the issue of bias and prejudice is unfounded. At every stage of the proceedings in this case, respondents promptly noted and insisted upon their objections to those rulings and conduct of the trial judge which they conceived to be in error, including the deposition testimony of the witness Hoyt (App. A. 20). However, it was the cumulative

effect of those errors, confirmed beyond any doubt by the district judge's findings of fact and conclusions of law (R.A. 1623-1632), which was urged by respondents and found by the Court of Appeals to compel the conclusion that the district judge was prejudiced in favor of plaintiff (App. A. 24). It was upon the whole record that respondents relied in charging prejudice and it was the whole record that the Court of Appeals considered in sustaining the charge. It was a matter properly to be raised and properly to be considered on appeal and petitioner's assertion that the respondents were tardy in raising it is completely unwarranted. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-240.

Conclusion

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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